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NO. 91-1522

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

WILLIAM J. HABERSTROH,
District Attorney of Blair
County, Pennsylvania, et al.,
Petitioners

v.

WAYNE PAUL BURKETT,
Respondent

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

RONALD EISENBERG
Special Assistant District
Attorney for Blair County
(Counsel of Record)

Counsel for William J.
Haberstroh, District
Attorney of Blair County

Philadelphia District
Attorney's Office
1421 Arch Street
Philadelphia, PA 19102
(215) 686-5700

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ARGUMENT

1. Respondent argues that review should be denied here because the issue of the Speedy Trial Clause's applicability to post-verdict proceedings was not properly preserved in the courts below. Respondent relies on two cases: City of Springfield v. Kibbe, 480 U.S. 257 (1987), and California v. Taylor, 353 U.S. 553 (1957). In both of

these cases, however, the Court concluded that the issue in question was neither raised in nor addressed by the lower courts. Here, in contrast, as respondent acknowledges, he himself explicitly raised the issue in question in both the district court and the court of appeals, and both courts explicitly addressed it. App. 23-25, 107-08, 119-20.

Respondent's real complaint is that petitioner, while strenuously opposing respondent's entitlement to any relief under Sixth Amendment standards, did not specifically demand that the courts below ignore binding circuit precedent, which had already decided the threshold question of whether the Speedy Trial Clause applied to proceedings after verdict. Petitioner has been unable to find any opinion of this Court in which it declined review under

such circumstances. Nor should it do so here.[1]

First, it would clearly have been futile for petitioner to argue below that Speedy Trial Clause protection does not extend beyond a guilty verdict. The Third Circuit, in a prior appeal involving this very same respondent, had already held squarely that it does. Burkett v. Cunningham, 826 F.2d 1208, 1220 (3d Cir. 1987). In the present proceeding, the magistrate, district court, and court of appeals simply followed that decision. Petitioner understandably concentrated his efforts on

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[1]Indeed, the Court has accepted review even over questions that, unlike here, were clearly neither raised nor resolved in the lower courts. E.g., City of Houston v. Hill, 482 U.S. 451, 467 n.16 (1987); United States v. Mendenhall, 446 U.S. 544, 551-52 n.5 (1980); Youakim v. Miller, 425 U.S. 231, 233-34 (1976). Where the issue in question was decided by the courts below, as here, the Court has readily rejected objections to review like respondent's, even if timely made in the brief in opposition to certiorari. Stevens v. Department of Treasury, 111 S. Ct. 1562, 1567 (1991).

distinguishing this recent precedent, rather than expecting the courts to disregard it.[2]

Second, the Third Circuit decision on review here represents a significant, unanticipated expansion of the doctrine established in Burkett v. Cunningham. The court of appeals went beyond its prior opinion by constructing a new form of relief for post-conviction "speedy trial" claims: sentence reduction. This was a remedy that not even respondent himself had ever requested. In creating the illusion that delays after verdict can now be surgically "repaired" without the drastic recourse of complete

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[2]Respondent's brief discusses not only petitioner's position below, but also the positions taken by the state in the earlier proceedings that led to the Third Circuit's Burkett v. Cunningham opinion. The holding there, however, arose out of a previous habeas corpus petition, concerning a previous one of respondent's several convictions, handled by a previous district attorney. The litigation posture of a different lawyer in a different case cannot constitute a "waiver" here.

discharge, the Third Circuit's novel approach will undoubtedly increase Speedy Trial Clause litigation in the post-verdict setting. Such a material change in the law places new scrutiny on its underlying premise: that the Speedy Trial Clause should apply in this context at all.

Third, this is a matter of public importance. Twenty-five states and a federal territory have filed an amicus curiae brief in support of the petition for certiorari. These jurisdictions share the concern that legal standards crafted to protect the presumption of innocence before trial cannot be imported wholesale into proceedings after a guilty verdict. Predictably, the poor fit produces poor results, such as the weakening here of the prejudice requirement and the invention of a new remedy. In the end, there is further federal intervention into state post-verdict and appellate procedures, including

the unprecedented ability to determine the length, not just the legality, of state sentences. This Court's review is warranted.[3]

2. Respondent argues that review should be denied because the decision below rests on a "unique factual matrix," and therefore does not raise any issues of general import. This is no more true here than in any case, all of which rest on a "unique factual matrix." The alleged uniqueness here -- that there was much

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[3]It must be noted that respondent's argument that review should be denied on "waiver" grounds addresses only the first question presented in the certiorari petition, and ignores the other two. Respondent makes no claim that petitioner's second question, concerning prejudice, was not litigated below; in fact, it was hotly contested. Nor does respondent contend that the third question, concerning remedy, was not properly preserved; in fact, neither party treated the sentence reduction issue, since they did not know it existed until the court of appeals issued its opinion. The first question presented, concerning the general scope of the Speedy Trial Clause, is fairly comprised within the remaining two, which respondent acknowledges are properly before the Court.

delay in Blair County during the period when this case was in the trial court -- of course provided the background for the court of appeals' rulings, but did not unusually limit their precedential effect. The important principles on which the decision rests -- that the Speedy Trial Clause applies post-verdict; that the same legal standard applies to delay claims at all stages from arrest through appeal, regardless of the absence of relevant prejudice; and that sentence reduction is an appropriate remedy -- operate in every post-conviction delay case.

As part of this argument, respondent contends that, even if the court of appeals were precluded from invoking the Speedy Trial Clause here, it would still have granted relief on due process grounds. That is undoubtedly true, but it heightens rather than lessens the need for review. The court of appeals simply cloned Sixth

Amendment pre-trial delay standards into Sixth Amendment post-trial delay standards, and then cloned them yet again into Fourteenth Amendment appellate delay standards. By doing so, the court obliterated significant distinctions between different criminal proceedings and constitutional provisions. The petition for certiorari noted and sought review of this gloss-over. Petition at 28-29.

3. Respondent argues that review should be denied because there is no confusion in the lower courts on the application of the Speedy Trial Clause to proceedings after a guilty verdict. He asserts that most of the federal and state courts faced with the question have considered post-verdict delay claims in terms of the Speedy Trial Clause. As above, that is indeed so, but, as above, it is precisely the problem. All the federal cases, and the largest category of state cases, have

reached this result simply by parroting Pollard v. United States, 352 U.S. 354 (1957), or by relying on other cases that simply parrot Pollard. The confusion arises from the fact that Pollard never held that the Speedy Trial Clause applies to post-conviction proceedings. An entire legal edifice has been built on a nonexistent foundation. That is why review is warranted.

4. Respondent argues that review should be denied because the decision below was correct under this Court's settled precedent. He contends that the court of appeals properly found prejudice based on his "anxiety," because this Court held in Moore v. Arizona, 414 U.S. 25 (1973), that "personal" prejudice, not just harm to trial preparation, could support a speedy trial claim. But Moore was a pre-trial case. The issue for this Court now is whether the apprehensions of a convicted

criminal who is properly facing punishment are entitled to the same constitutional consideration as the undue strain suffered by a person who is still presumed innocent. Neither Moore nor any of this Court's other opinions have yet answered that question.

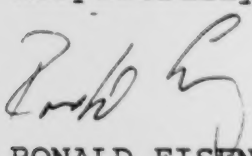
Respondent also maintains that the positions urged by petitioner for this Court's review would require the Court to overrule Evitts v. Lucey, 469 U.S. 387 (1985) (right to effective assistance of counsel on appeal), and Griffin v. Illinois, 351 U.S. 12 (1956) (right to free transcripts on appeal). But these cases merely recognized particular due process rights in the appellate context. Petitioner is not contending that the Due Process Clause should never apply to appellate procedural issues. The significant, unanswered question is how it applies to the specific issue of appellate delay.

Finally, respondent asserts that the remedy of sentence reduction is embodied in Strunk v. United States, 412 U.S. 434 (1973), and 28 U.S.C. § 2243, the federal habeas relief statute. But Strunk is a case in which this Court rejected sentence reduction as a remedy for a pre-trial Speedy Trial Clause violation. Nothing about it addresses whether sentence reduction would be an appropriate remedy for a post-verdict Speedy Trial Clause claim -- or whether, indeed, there is any such thing as a post-verdict Speedy Trial Clause claim. Section 2243 is no more dispositive. A habeas court's authority to "dispose of the matter as law and justice require" does not permit it to exceed the scope of the underlying federal right that gave it power to act in the first place. The questions raised by the petition for certiorari remain open.

CONCLUSION

For these reasons, petitioner respectfully requests that a writ of certiorari issue to review the decision below.

Respectfully submitted,



RONALD EISENBERG
Special Assistant District
Attorney for Blair County
(Counsel of Record)

Counsel for William J.
Haberstroh, District
Attorney of Blair County

Philadelphia District
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Philadelphia, PA 19102
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